Supreme Court, U.S.
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No. 10-430

In The

Supreme Court of the United States

SHANNA WERNER, an individual,
and JAMES BRYANT, an individual,

Petitioners,

v.

PEAK ALARM COMPANY, INC., a Utah Corporation,
JERRY D. HOWE, an individual, and
MICHAEL JEFFREY HOWE, an individual,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

PETITIONERS' REPLY BRIEF

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I. THE PROPER BASIS FOR JURISDICTION OVER THIS PETITION IS 28 U.S.C. § 1257(a).

In Part I of their Brief in Opposition, Respondents correctly point out an inadvertent error in Petitioners' statement of jurisdiction. On page two, under the heading "Jurisdiction," subpart 3, Petitioners incorrectly identified 28 U.S.C. § 1254(1) as the statutory basis for this Court's jurisdiction over the Petition. Petitioners intended, and hereby amend their Petition, to cite 28 U.S.C. § 1257(a) as the proper basis for jurisdiction in their Petition for Writ of Certiorari. Petitioners' clerical error in this regard was purely technical, not substantive, and is not a sufficient ground for summary denial of the Petition on this basis alone.[1]

II. PETITIONERS COMPLIED WITH THE REQUIREMENTS OF UNITED STATES SUPREME COURT RULE 14(1)(g)(i).

Respondents are not correct, however, in their remaining arguments. First, in Parts I and II of their Brief in Opposition, Respondents inexplicably assert

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[1] Petitioners presume that this acknowledgement of its technical error is sufficient to satisfy the requirement of United States Supreme Court Rule 14(1)(e)(iv), requiring "a concise statement of the basis for jurisdiction in this Court." However, if Petitioners are required to file an Amended Petition for Writ of Certiorari to satisfy the Court's rule, they stand ready to do so if required.

that the Utah Supreme Court's decision in this matter did not even "implicate any settled federal precedent," nor did the Court "decide any question of federal law at all." Respondents' Brief at 7 and 9. Further, Respondents contend, all the Utah Supreme Court did was "to construe Utah's 'false alarm' statute," and reversed the trial court's grant of summary judgment on Respondents' federal civil rights claim based solely on the Court's reading of state, not federal, law. *Id.* at 9. These assertions are plainly false, and contrary to established federal precedent.

There is no dispute that the cause of action addressed by the Utah Supreme Court, relevant to the certiorari petition here, alleged a violation of Respondents' Fourth Amendment rights, privileges and immunities under the United States Constitution to be free from unreasonable search and seizure. App. 10, 25, 29, 30, 37, 81, 84-85. Respondents' right to bring this cause of action was created by federal statute, 42 U.S.C. § 1983, authorizing an action at law to redress alleged constitutional violations. App. 10, 12, 25, 81. The claim was analyzed by both the trial court and the Utah Supreme Court under federal case law regarding the Fourth Amendment, qualified immunity and probable cause standards. App. 25-38, 81-88.

While it is certainly true that the Utah Supreme Court construed the provisions of Utah's "False Alarm" statute (a matter of first impression in Utah) in determining whether probable cause existed in this case, it was only *one* of many factors the Court was

required to consider under the federal qualified immunity analysis. Unfortunately, as pointed out in Petitioner's opening brief, the Utah Supreme Court erroneously determined that probable cause was lacking based solely on Howe's claimed subjective knowledge of the falsity of his report, and prematurely concluded its qualified immunity analysis at this step.

This Court's jurisprudence is clear that "§ 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002). The constitutional reasonableness of a search or seizure does not depend upon the law of the state in which the search or seizure occurred. *Virginia v. Moore*, 128 S.Ct. 1598, 1602-1605 (2008). The touchstone of this Court's § 1983 jurisprudence has always been whether the conduct in question contravenes the federal constitution, not state law.

However, upon determining that Petitioners lacked probable cause to cite Howe under the Court's reading of Utah's false alarm statute, the Utah Supreme Court abruptly ended its analysis. It wholly failed to consider the reasonableness of Petitioners' probable cause determination based on the totality of all the surrounding circumstances. Instead, the Court relied solely on the facts alleged by Howe, finding that they "tend to show he believed a burglary was occurring," and failing to take into account all of the

other undisputed facts known to Petitioners at the time of their probable cause determination. App. 36.

No consideration was given to the fact that no Utah court had ever construed the provisions of Utah's false alarm statute in any reported decision, or that the statute's provisions left unclear the amount of evidence necessary to support a conviction or probable cause determination. Indeed, the Utah Supreme Court itself acknowledged this to be a close question. App. 35. "One purpose of qualified immunity is that we do not force public officials to guess how the law will have developed by the time their actions are scrutinized in federal court. *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1200 (10th Cir. 2009). "Instead, we look to the relevant precedents at the time of the challenged actions and the obviousness of the violation in light of them." *Id.* (citations omitted).

Given the complete absence of prior case law, and the uncertainty surrounding the proper interpretation of Utah's false alarm statute, it was not at all clear to Petitioners that their conduct was unlawful under the circumstances presented to them. The Utah Supreme Court should have held that Howe's constitutional rights were not clearly established at the time he was cited. *See Herrera v. City of Albuquerque*, 589 F.3d 1064, 1068-1073 (10th Cir. 2009).

Even though it may be clear (at least for now) that probable cause was lacking under the Court's interpretation of Utah's false alarm statute, the

critical question left unanswered by the Utah Supreme Court remains: at the time the probable cause determination was made, could Petitioners have reasonably, but mistakenly, concluded that probable cause existed to issue a citation to Howe? This is, without question, an issue of federal law, and a required element of the qualified immunity analysis under the federal courts' jurisprudence.

III. PETITIONERS RAISED THESE ISSUES OF FEDERAL LAW BEFORE BOTH THE TRIAL COURT AND THE UTAH SUPREME COURT.

Is it clear from the Utah Supreme Court's decision (App. 1-59) and the Third District Court's Ruling (App. 60-100) that Petitioners, in defense of Respondents' federal claims, raised the issues of probable cause and qualified immunity before both courts. App. 3-4, 11-12, 25-38, 81-88. This is all that was required of Petitioners. It would be completely unreasonable to require that Petitioners anticipate or predict with precise specificity how either court would rule, and on what grounds they would base their decisions, at the pleading/briefing stage. However, even though it was not required, the Petitioners did indeed raise the specific issues before both courts that Respondents erroneously claim were not raised.

A. Howe's subjective belief.

Contrary to Respondents' allegations in Part III.A. of their Brief in Opposition, Petitioners specifically

argued to the trial court that Sgt. Bryant had probable cause to issue the citation to Howe.[2] Petitioners' Amended Memorandum in Support of Motion for Summary Judgment ("Petitioners' Summary Judgment Memo"), pp. 28-33. After noting the facts and circumstances known to Sgt. Bryant at the time of the probable cause determination (*Id.* at 28-29), and noting that Sgt. Bryant also consulted with a city prosecutor for legal advice on the proper course of action (*Id.* at 30), Petitioners argued that Howe's justifications for his actions had no effect on the probable cause determination. *Id.* at 31.

Citing state and federal case law, Petitioners argued that they were under no obligation to forego an arrest merely because a suspect says he is innocent. *Id.* To show probable cause for intent, they need only prove that their theory of intent is reasonable. *Id.* "Knowledge or intent is a state of mind generally to be inferred from the person's conduct viewed in light of all the accompanying circumstances." *Id.* at 32, *citing State v. Kihlstrom*, 1999 UT App 289, ¶ 10, 988 P.2d 949.

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[2] At this stage of the certiorari process, it is not clear to Petitioners whether this Court wishes to be provided copies of the parties' briefings to the trial court and/or Utah Supreme Court. Those pleadings are voluminous. In this Reply Brief, portions of those pleadings will be referred to, and where appropriate, quoted from. If this Court wishes to see any of those pleadings, Petitioners are more than willing to provide copies to the Court as quickly as reasonably practicable.

Respondents specifically argued that:

> The City's officers and prosecutors cannot be held to an impossible standard of *proving*, at the pre-citation stage, what Jeff Howe's state of mind or knowledge was at the time he made his report. This would require City officers and prosecutors to read a suspect's mind to develop the level of proof plaintiffs argue is required before proceeding with issuance of a citation or initiating prosecution. Such a standard would make any action based on knowing falsehoods impossible to prosecute. Instead, the defendants need only show that their theory of intent was reasonable based on Jeff Howe's conduct viewed in light of all the accompanying circumstances and any reasonable inferences drawn therefrom.

Id. at 32. In their Reply Memorandum, Petitioners devoted nearly four pages of argument to this issue. Reply Memorandum in Support of Motion for Summary Judgment (Petitioners' Reply Memo on Summary Judgment), pp. 24-27. Admitting their inability to read Howe's mind, Petitioners asserted that in making a probable cause determination, "an officer's reasonable belief that a criminal violation has occurred does not require mind-reading capabilities or voodoo magic," only a reasonable belief that Howe knowingly made a false report. *Id.* at 24-25.

In their brief to the Utah Supreme Court, Petitioners made the same arguments. Brief of Appellees, pp. 11-23.

B. Defeat of qualified immunity based on Petitioners' disbelief of Howe's justifications.

Respondents' arguments in Part III.B. of their Brief in Opposition, and footnote 3 in particular, starkly illustrate their misapprehension of federal qualified immunity jurisprudence. Contrary to their erroneous assertions, federal law is quite clear that Petitioners could have mistakenly lacked probable cause to arrest (even though Howe was not arrested here), but still be entitled to qualified immunity because their mistake was reasonable in light of the totality of circumstances presented to them at the time of the probable cause determination. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This is the very crux of the Petition for Certiorari before this Court, and the crucial element of the qualified immunity analysis which escapes both the Utah Supreme Court and Respondents. *See* Part II, Petition for Writ of Certiorari.

Nevertheless, Petitioners could not have anticipated that the Utah Supreme Court would reverse the trial court specifically because Petitioners chose to disregard Howe's claim that he subjectively believed a burglary occurred at the school. That issue was raised solely by the Utah Supreme Court. As set forth in Part III.A. above, Petitioners did raise the issues of Howe's subjective belief and the reasonableness of their probable cause determination before the trial court and the Utah Supreme Court, and similarly

argued that they were entitled to qualified immunity. Petitioners' Summary Judgment Memo, pp. 39-42; Petitioners' Reply Memo on Summary Judgment, pp. 33-34; Brief of Appellees, pp. 34-35.

C. Totality of facts and circumstances.

Part III.C. of Respondents' argument is moot because, regardless whether Petitioners addressed the issue in their briefings/pleadings, the Utah Supreme Court correctly noted in its decision that "'[p]robable cause is based on the totality of circumstances' and employs an objective test questioning whether a reasonable officer would believe the arrested individual has committed a crime." App. 33, *quoting Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007). Again, Petitioners had no way of knowing, in advance, that the Utah Supreme Court would seize on one fact asserted by Howe (his claimed subjective knowledge), and discard all of the rest of the surrounding undisputed circumstances in reversing the trial court.

Nevertheless, before the trial court, Petitioners noted that "[p]robable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a prudent [officer] in believing that an offense has been . . . committed." Petitioners' Summary Judgment Memo, p. 28, *quoting Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir. 1985). "Probable cause is an objective standard, and is evaluated

'in relation to the circumstances as they would have appeared to a prudent, cautious and trained police officer.'" *Id.* at 31, *quoting United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999).

The heading to Part I.A. of Petitioners' Brief to the Utah Supreme Court asserted, "PLAINTIFFS FAILED TO DEMONSTRATE A LACK OF PROBABLE CAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES." Brief of Appellees, p. 13. Petitioners discussed the facts and circumstances of the case, and went on to argue that, in light of all the accompanying circumstances and any reasonable inferences drawn therefrom, any prudent officer would be reasonable in his belief that Howe violated the false alarm statute. *Id.* at 13-21.

CONCLUSION

Respondents correctly assert that 28 U.S.C. §1257(a) is the proper basis for this Court's jurisdiction over the Petition for Writ of Certiorari. Their remaining allegations, however, are not correct. Petitioners did comply with Supreme Court Rule 14(1)(g)(i). The Petition raises issues of federal law which were properly raised by Petitioners and decided by the Utah Supreme Court and the trial court below. Because the remaining arguments in Respondents' Brief in Opposition are without merit,

Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted November 16, 2010.

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